

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HANK WILLIAM GRAVELLE,

Defendant-Appellant.

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UNPUBLISHED

May 13, 2014

No. 314713

Chippewa Circuit Court

LC No. 12-000818-FH

Before: FITZGERALD, P.J., and SAAD and WHITBECK, JJ.

PER CURIAM.

Defendant, Hank William Gravelle, appeals as of right his conviction, following a jury trial, of second-degree home invasion.<sup>1</sup> The trial court sentenced Gravelle as a fourth-offense habitual offender<sup>2</sup> to serve 3 to 25 years' imprisonment. We affirm.

**I. FACTS**

**A. BACKGROUND FACTS**

According to Helen Gravelle, Gravelle's stepmother, on January 22, 2012, she let Gravelle borrow some money and informed him that she would be out of town for a few days. Gravelle then asked to borrow more money, which she declined to lend him. She locked her home before she left. Gravelle did not have a key. When she returned to her home on January 24, 2012, she discovered scratches on her front door. She later found a knife, which was part of a gift set that she and her husband had given Gravelle, in her dishwasher. She noticed that she was missing about \$30 in coins and a nail gun worth about \$300.

Helen Gravelle testified that she was angry and believed that Gravelle had been in her home. She had not given Gravelle permission to be in her home while she was gone, to take coins from her coin jar, or to take her nail gun. Helen Gravelle tried to call Gravelle and, when he failed to answer, she called the police. Sheriff Deputy Douglas Mitchell testified that Helen

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<sup>1</sup> MCL 750.110a(3).

<sup>2</sup> MCL 769.12.

Gravelle was upset and told him that she suspected that Gravelle took the items. Helen Gravelle later spoke to Gravelle on the phone, and he told her, “I took your stuff.”

Helen Gravelle stated that she did not want to testify on behalf of the prosecution. She testified that the nail gun was a gift from Gravelle’s father, and that Gravelle may have believed that he had the right to take the nail gun because he had inherited some tools from his father.

Amanda Teeple testified that Gravelle asked her to pawn a nail gun for him because he did not have identification. Teeple testified that she purchased the nail gun from Gravelle for \$5 or \$10 because her boyfriend might want it. When her boyfriend did not want the nail gun, she pawned it for \$16. Lyman Cobiere testified that, shortly after he purchased the nail gun from Teeple, Gravelle and a friend purchased the nail gun from his pawn shop for about \$20. Helen Gravelle testified that Gravelle returned the nail gun.

Teeple testified that she later pleaded guilty to receiving stolen property. The prosecutor asked Teeple if, during her plea, she stated that she knew the gun was stolen. Defense counsel challenged the question, and the trial court stated that Teeple “doesn’t know whether it was stolen. She can surmise, she can think, she doesn’t know unless she stole it. . . . Her statement isn’t proof it was stolen.”

## B. PROCEDURAL HISTORY

After the prosecution’s case in chief, Gravelle moved for a directed verdict on the basis that the prosecutor did not prove that he committed the crime. The prosecutor responded that the jury could infer that he entered Helen Gravelle’s home with intent to steal the change and nail gun from the circumstantial evidence, which included that Gravelle forced his way into the home and took Helen Gravelle’s property without permission.

While discussing the jury instructions, the trial court asked defense counsel if he was requesting instructions on any lesser included offenses. Defense counsel responded “I am not, Your Honor,” and then explained that Gravelle was entirely innocent. Defense counsel asked for an instruction on claim of right, asserting that “the evidence is [Gravelle] acted out of a claim of right so [he] did not have the intent to steal.” The prosecutor responded that there was no evidence that the property was legally Gravelle’s. The trial court declined defense counsel’s request to issue a claim of right instruction.

## II. TEEPLE’S GUILTY PLEA

### A. STANDARD OF REVIEW AND ISSUE PRESERVATION

This Court reviews for an abuse of discretion preserved challenges to the trial court’s evidentiary rulings, and reviews de novo issues of law surrounding the admission of evidence.<sup>3</sup>

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<sup>3</sup> *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001).

To preserve an issue, the appellant must challenge it before the trial court.<sup>4</sup> Here, Gravelle did not challenge Teeple's statement that she pleaded guilty to receiving and concealing stolen property before the trial court. Thus, this issue is unpreserved.

We review unpreserved issues for plain error affecting a party's substantial rights.<sup>5</sup> An error is plain if it is clear or obvious.<sup>6</sup> The error affected the defendant's substantial rights if it affected the outcome of the lower court proceedings.<sup>7</sup>

## B. LEGAL STANDARDS

Evidence of an accomplice's conviction is not admissible as substantive evidence of a defendant's guilt in that defendant's separate trial.<sup>8</sup> But testimony about the circumstances surrounding an accomplice's guilty plea is admissible to impeach the accomplice as a witness, even if the witness did not receive anything in exchange for his or her plea.<sup>9</sup>

## C. APPLYING THE STANDARDS

Gravelle asserts that the admission of Teeple's guilty plea to receiving and concealing stolen property was plain error that prejudiced him. We disagree.

The record shows that the prosecutor sought to use Teeple's guilty plea to establish that the nail gun was stolen. The prosecutor did not attempt to establish that Teeple received something, received nothing, or agreed to testify as a result of pleading guilty. Thus, we conclude that the prosecutor sought to use Teeple's plea as substantive evidence of Gravelle's guilt, rather than as impeachment evidence.

However, this Court can only conclude that the prosecutor sought to use the evidence improperly with the benefit of hindsight. At the time that the prosecutor asked Teeple whether she pleaded guilty to receiving and concealing stolen property, the trial court could not have been aware that the prosecutor did not intend to ask Teeple whether she obtained some benefit, or agreed to testify against Gravelle, pursuant to her plea. While Teeple's plea was inadmissible because the prosecutor used it as substantive evidence of Gravelle's plea, we conclude that it was not a *plain or obvious* error for the trial court to admit the testimony.

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<sup>4</sup> *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004); *People v Danto*, 294 Mich App 596, 605; 822 NW2d 600 (2011).

<sup>5</sup> *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *People v Lytal*, 415 Mich 603, 612; 329 NW2d 738 (1982); *People v Standifer*, 425 Mich 543, 553, 552 n 4; 390 NW2d 632 (1986) (opinion by BOYLE, J.); *People v Dowdy*, 211 Mich App 562, 571; 536 NW2d 794 (1995).

<sup>9</sup> *Dowdy*, 211 Mich App at 570-71. See *Standifer*, 425 Mich at 555.

Further, the admission of Teeple's guilty plea did not affect the outcome of Gravelle's trial because the trial court issued an appropriate curative instruction as soon as the prosecutor used Teeple's guilty plea for an improper purpose. Here, the prosecutor followed up Teeple's statement that she pleaded guilty by asking her whether she had stated that the gun was stolen. Defense counsel challenged the question, and the prosecution responded that he was asking Teeple about her plea hearing. The trial court stated that Teeple's statement could not be proof that the gun was stolen and that Teeple did not know whether the gun was stolen because she was not present at the crime. The trial court's contemporaneous statement made the jury aware that it could not use Teeple's testimony to infer that Gravelle stole the nail gun. Thus, we conclude that it is highly unlikely that the admission of Teeple's guilty plea influenced the jury's verdict.

### III. JURY INSTRUCTIONS

#### A. STANDARD OF REVIEW

When reviewing a claim of instructional error, this Court views the instructions as a whole to determine whether they adequately presented the issues to the jury.<sup>10</sup> This Court reviews de novo questions of law, including whether an offense is an included lesser offense and whether instructional error violated the defendant's constitutional right to due process.<sup>11</sup> This Court reviews for an abuse of discretion the trial court's decision regarding the applicability of a jury instruction to the facts of a specific case.<sup>12</sup> The trial court abuses its discretion when its outcome falls outside the reasonable and principled range of outcomes.<sup>13</sup>

#### B. LEGAL STANDARDS

"A criminal defendant is entitled to have a properly instructed jury consider the evidence against him."<sup>14</sup> The jury instructions "must include all elements of the charged offenses and any material issues, defenses, and theories" if there is evidence to support them."<sup>15</sup> If a defendant requests an instruction that the evidence supports, the trial court errs if it fails to give the

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<sup>10</sup> *People v Martin*, 271 Mich App 280, 337-338; 721 NW2d 815 (2006).

<sup>11</sup> *People v Wilder*, 485 Mich 35, 40; 780 NW2d 265 (2010).

<sup>12</sup> *People v McKinney*, 258 Mich App 157, 163; 670 NW2d 254 (2003).

<sup>13</sup> *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

<sup>14</sup> *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002). See *United States v Gaudin*, 515 US 506, 510; 115 S Ct 2310; 132 L Ed 2d 444 (1995).

<sup>15</sup> *People v Reed*, 393 Mich 342, 349-350; 224 NW2d 867 (1975). See *McKinney*, 258 Mich App at 162-163.

instruction.<sup>16</sup> But this Court will only reverse if the omitted jury instruction was outcome determinative and thus led to a miscarriage of justice.<sup>17</sup>

### C. PERMISSION TO ENTER

Gravelle contends that the trial court erred by failing to instruct the jury on “entry without permission” because he could not be guilty of home invasion if he entered a home that he had a right to enter. We disagree.

As an initial matter, we note that Gravelle did not preserve this issue. To preserve an issue for appellate review, the defendant must raise the same challenge before the trial court.<sup>18</sup> Here, Gravelle requested a jury instruction on claim of right, but failed to request an instruction on entering without permission. When a defendant fails to challenge an omitted jury instruction, we review the issue for plain error affecting the defendant’s substantial rights.<sup>19</sup> An error is plain if it is clear or obvious.<sup>20</sup> An error affected the defendant’s substantial rights if it affected the outcome of the lower court proceedings.<sup>21</sup>

We conclude that the trial court did not clearly err when it failed to instruct the jury about entering without permission. Gravelle mischaracterizes the record when he states that Helen Gravelle testified that she gave him permission to be in her home. Helen Gravelle testified that Gravelle frequently visited, but that he did not live in her home and she did not give him permission to be in her home while she was gone. There was no evidence that Gravelle had permission to enter Helen Gravelle’s home. Thus, the trial court did not clearly err when it failed to instruct the jury on entering without permission.

### D. CLAIM OF RIGHT

Gravelle contends that the trial court erred by denying his request for a claim of right instruction. We conclude that reversal is not warranted because the trial court’s instructions fairly presented the law to the jury and did not lead to a miscarriage of justice.

A defendant lacks the intent to steal property if the defendant believes, in good faith, that he or she is entitled to possess it.<sup>22</sup> Defense counsel requested a claim of right instruction

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<sup>16</sup> *Riddle*, 467 Mich at 124; *McKinney*, 258 Mich App at 163.

<sup>17</sup> *Riddle*, 467 Mich at 124; *McKinney*, 258 Mich App at 163.

<sup>18</sup> *Kimble*, 470 Mich at 309; *Danto*, 294 Mich App at 605.

<sup>19</sup> *People v Gonzalez*, 468 Mich 636, 643; 664 NW2d 159 (2003).

<sup>20</sup> *Carines*, 460 Mich at 763.

<sup>21</sup> *Id.*

<sup>22</sup> *People v Pohl*, 202 Mich App 205; 507 NW2d 819 (1993), citing *People v Holcomb*, 395 Mich 326, 333; 235 NW2d 343 (1975).

providing that a defendant does not have the intent to steal if there is evidence that the defendant honestly believed that the property legally belonged to the defendant.<sup>23</sup>

Here, Helen Gravelle testified that Gravelle may have believed that he was entitled to the nail gun because he had inherited some tools from his father. Defense counsel's theory of the case was that Gravelle was innocent because he did not intend to steal the nail gun and instead thought that it was his property. However, other evidence strongly contradicts Gravelle's asserted claim of right, including the circumstantial evidence and Helen Gravelle's testimony that he told her that he took her things. Given the extensive evidence contradicting Gravelle's claim of right, we conclude that the trial court's decision not to issue the instruction was within the reasonable range of outcomes.

Further, even if the trial court erred, its instructions fairly presented the issue to the jury. The trial court instructed the jury that it could only find that Gravelle committed a home invasion if he entered Helen Gravelle's home while intending to commit a larceny, which it defined as taking someone else's property without that person's consent. The jury could not have found Gravelle guilty if it found that he entered Helen Gravelle's home while intending to take his own property. Thus, any error was not outcome determinative.

#### IV. SUFFICIENCY OF THE EVIDENCE

##### A. STANDARD OF REVIEW

A claim that the evidence was not sufficient to convict a defendant invokes that defendant's constitutional right to due process of law.<sup>24</sup> Thus, this Court reviews de novo a defendant's challenge to the sufficiency of the evidence.<sup>25</sup> We view the evidence in a light most favorable to the prosecutor to determine whether a rational trier of fact could find that the prosecutor proved the elements of the crime beyond a reasonable doubt.<sup>26</sup>

##### B. LEGAL STANDARDS

To prove that a defendant committed a home invasion, the prosecutor must prove that (1) the defendant entered a dwelling by breaking or without permission, and (2) he or she intended to commit, or did commit, a larceny, felony, or assault inside.<sup>27</sup> A larceny is the taking of

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<sup>23</sup> CJI2d 7.5.

<sup>24</sup> *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992). See *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970).

<sup>25</sup> *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011).

<sup>26</sup> *Id.*

<sup>27</sup> MCL 750.110a(3); *People v Nutt*, 469 Mich 565, 593; 677 NW2d 1 (2004).

another person's property, without consent, outside of the person's presence.<sup>28</sup> To commit a larceny, the defendant must intend to take *someone else's* property, not his or her own property.<sup>29</sup>

### C. APPLYING THE STANDARDS

#### 1. ENTRY WITHOUT PERMISSION

Gravelle contends that the evidence was not sufficient to prove that he entered Helen Gravelle's home without permission. We disagree.

A person cannot break and enter a home that he or she has a legal right to enter.<sup>30</sup> Here, Helen Gravelle testified that Gravelle did not have a key to her home and she did not give him permission to enter it. Helen Gravelle locked her front door when she left. When she returned, her front door was scratched. She found Gravelle's knife in her dishwasher. Viewing Helen Gravelle's testimony in the light most favorable to the prosecutor, a reasonable jury could find that Gravelle did not have a right to enter Helen Gravelle's home.

#### 2. INTENT TO STEAL

Next, Gravelle contends that the evidence was not sufficient to prove that he intended to take his stepmother's property because he believed that the nail gun was his. We disagree.

If a defendant has a good faith belief that the defendant owned the property that he or she allegedly stole, the defendant did not commit a larceny because the defendant did not intend to take someone else's property.<sup>31</sup> Here, Helen Gravelle testified that Gravelle might believe that he had a right to take the nail gun because he had inherited some tools from her husband. But Helen Gravelle also testified that she spoke with Gravelle on the phone shortly after the offense, and he stated, "I took your stuff." This Court will not interfere with the trier of fact's role to determine the weight of the evidence or the credibility of the witnesses.<sup>32</sup> We conclude that Helen Gravelle's conflicting testimony created a question of fact for the jury to resolve, and we will not interfere with its determination.

Further, circumstantial evidence and reasonable inferences arising from that evidence can prove the defendant's state of mind, knowledge, or intent.<sup>33</sup> Here, Helen Gravelle had recently declined to loan Gravelle money. Helen Gravelle left town, and when she returned, she found

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<sup>28</sup> MCL 750.356; *People v Perkins*, 473 Mich 626, 634 n 9; 703 NW2d 448 (2005).

<sup>29</sup> *Pohl*, 202 Mich App at 205.

<sup>30</sup> See *People v Szpara*, 196 Mich App 270, 273-247; 492 NW2d 804 (1992).

<sup>31</sup> *Pohl*, 202 Mich App at 205.

<sup>32</sup> *Wolfe*, 440 Mich at 514-515; *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

<sup>33</sup> *Kanaan*, 278 Mich App at 622.

scratch marks on her door and Gravelle's knife in her dishwasher. Gravelle did not take the nail gun while Helen Gravelle was present. He almost immediately sold the nail gun for well below its value. Viewing this evidence in a light most favorable to the prosecutor, we conclude that a reasonable jury could find that Gravelle did not believe that the nail gun was his property.

### 3. INTENT TO PERMANENTLY DEPRIVE

Finally, Gravelle contends that the evidence was not sufficient to prove that he intended to permanently deprive Helen Gravelle of her property. Gravelle asserts that he pawned the nail gun and intended to get it back. We conclude that the record does not support Gravelle's assertion.

The party seeking reversal on appeal has the burden to provide the court with a record that establishes the factual basis of his or her argument.<sup>34</sup> Here, Teeple testified that Gravelle sold her the gun for \$5 or \$10. She later pawned it. Cobeire testified that he purchased the gun from Teeple. No one testified that Gravelle pawned the gun. We reject Gravelle's argument because he has not established a factual basis to support it.

## V. INEFFECTIVE ASSISTANCE OF COUNSEL

### A. STANDARD OF REVIEW AND ISSUE PRESERVATION

A defendant's ineffective assistance of counsel claim "is a mixed question of fact and constitutional law."<sup>35</sup> When reviewing an ineffective assistance claim, this Court reviews for clear error the trial court's findings of fact, and reviews de novo questions of law.<sup>36</sup>

The defendant must move the trial court for a new trial or evidentiary hearing to preserve the defendant's claim that his counsel was ineffective.<sup>37</sup> When the trial court has not conducted a hearing to determine whether a defendant's counsel was ineffective, our review is limited to mistakes apparent from the record.<sup>38</sup> Here, our review is limited to mistakes apparent from the record because Gravelle did not move for or receive an evidentiary hearing.

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<sup>34</sup> *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000).

<sup>35</sup> *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

<sup>36</sup> *Id.*

<sup>37</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008).

<sup>38</sup> *People v Gioglio (On Remand)*, 296 Mich App 12, 20; 815 NW2d 589 (2012).



## B. LEGAL STANDARDS

A criminal defendant has the fundamental right to effective assistance of counsel.<sup>39</sup> To prove that his defense counsel was not effective, the defendant must show that (1) defense counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that counsel's deficient performance prejudiced the defendant.<sup>40</sup> The defendant must overcome the strong presumption that defense counsel's performance constituted sound trial strategy.<sup>41</sup> We give defense counsel wide discretion in matters of trial strategy because counsel may be required to take calculated risks to win a case.<sup>42</sup>

## C. LESSER INCLUDED OFFENSE INSTRUCTION

Gravelle contends that counsel was ineffective for failing to request instructions on the lesser included offenses of (1) breaking and entering or (2) entering without permission. We disagree.

Counsel's decision not to request a lesser included offense instruction is a matter of trial strategy.<sup>43</sup> "A particular strategy does not constitute ineffective assistance of counsel simply because it does not work."<sup>44</sup> Here, the record shows counsel deliberately rejected lesser included offense instructions in favor of pursuing a defense of complete innocence. We conclude that counsel's strategy was reasonable because requesting instructions on the lesser included offenses of breaking and entering or entering without permission would have been inconsistent with counsel's theory of the case. Further, lesser included offense instructions would have distracted the jury from counsel's stronger argument that the jury should find Gravelle completely innocent.<sup>45</sup>

We conclude that counsel's decision not to request these lesser included offense instructions was a reasonable trial strategy. We reject Gravelle's additional argument that counsel was ineffective for failing to request a general jury instruction on entering without permission for the same reason.

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<sup>39</sup> US Const, Am VI; Const 1963, art 1, § 20; *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984).

<sup>40</sup> *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

<sup>41</sup> *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012); *Strickland*, 466 US at 690.

<sup>42</sup> *Pickens*, 446 Mich at 325.

<sup>43</sup> *People v Armstrong*, 124 Mich App 766, 769; 335 NW2d 687 (1983).

<sup>44</sup> *People v Matuszak*, 263 Mich App at 61.

<sup>45</sup> See *People v Unger*, 278 Mich App 210, 262; 749 NW2d 272 (2008) (counsel may reasonably decide not to draw attention to an issue).

#### D. TEEPLE'S GUILTY PLEA

Gravelle asserts that counsel was ineffective for failing to challenge the admission of Teeple's guilty plea. Gravelle has failed to properly present this issue for our review by including it in his statement of issues presented.<sup>46</sup> Therefore, we decline to consider it. Even if we considered this issue on the merits, Gravelle would not prevail because, as we have concluded above, the admission of Teeple's guilty plea did not prejudice him.

#### VI. CONCLUSION

We conclude that the admission of Teeple's guilty plea did not constitute plain error affecting Gravelle's substantial rights. We conclude that the trial court's jury instructions fairly presented the issues and theories to the jury. We also conclude that sufficient evidence supported Gravelle's home-invasion conviction. Finally, we conclude that counsel rendered effective assistance to Gravelle.

We affirm.

/s/ E. Thomas Fitzgerald  
/s/ Henry William Saad  
/s/ William C. Whitbeck

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<sup>46</sup> See MCR 7.212(C)(5); *Unger*, 278 Mich App at 262.